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No. 83-766

In the Supreme Court of the United States

OCTOBER TERM, 1983

SMITH-CORONA GROUP, CONSUMER PRODUCTS DIVISION, SCM CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT E. KOPP
CHRISTINE R. WHITTAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the Secretary of Commerce acted reasonably, and within a constitutionally permissible delegation of statutory authority to determine antidumping duties, in issuing a regulation (19 C.F.R. 353.15(c)) that permits adjustments in the exporter's sales price for all actual selling expenses incurred in the home market up to the amount of selling expenses incurred in the United States market.

2. Whether the "Cost Rule" (19 C.F.R. 353.15(d)), which states that, in determining the amount of adjustments for differences in circumstances of sale of goods subject to antidumping duties, the Secretary of Commerce will be guided primarily by the cost of such differences to the seller, is reasonable and consistent with the underlying statute.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 713 F.2d 1568. The opinion of the Court of International Trade (Pet. App. 28a-72a) is reported at 540 F.Supp. 1341.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. The petition for a writ of certiorari was filed on November 7, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 772 and 773 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 181-186, 19 U.S.C. 1677a, 1677b, are set forth in

relevant part at Pet. App. 73a-80a. The relevant regulations of the Department of Commerce, 19 C.F.R. 353.15, are set forth at Pet. App. 81a-82a.

STATEMENT

1. Congress has established an elaborate statutory scheme in an effort to protect United States industries and workers from competition from foreign manufacturers who sell their products at a lower price in the United States than in the home market. When this form of price discrimination, commonly known as "dumping," results in injury to a domestic industry, it is subject to offsetting duties. The current antidumping law was enacted as part of the Trade Agreements Act of 1979, Pub. L. No. 96-39, 93 Stat. 144 *et seq.*, which amended the Tariff Act of 1930, 19 U.S.C. 1673 *et seq.* The Secretary of Commerce has responsibility for implementing the antidumping law.

The statute provides that, if foreign merchandise is sold or likely to be sold in the United States at less than its fair value, to the material injury of a United States industry, then an antidumping duty will be imposed. 19 U.S.C. 1673. The amount of this duty is equal to the amount by which the foreign market value of the merchandise exceeds the United States price.

Proceedings under the antidumping law are conducted in two stages. First, the Department of Commerce ("Department") and the International Trade Commission ("Commission") begin an investigation, either on the Department's own initiative or in response to a petition from an interested domestic party. The Department determines whether foreign merchandise is being sold in the United States at less than its fair value, while the Commission decides whether such imports are causing, or threatening to cause, material injury to a United States industry. If both the Department and the Commission issue affirmative

determinations, the Department then publishes an antidumping duty order requiring the deposit of estimated antidumping duties pending liquidation of entries of merchandise and directing customs officers within a limited period of time to assess an antidumping duty equal to the amount by which the foreign market value of the merchandise at issue exceeds its United States price.[1]

In the second stage, the Department makes an exact assessment of the antidumping duties. The statute allows for an "early determination of duty," which permits foreign manufacturers of dumped merchandise an opportunity for a special review of their pricing structure and the determination of new dumping margins from more current data. 19 U.S.C. 1673e(c). This review is based upon sales of merchandise imported from the date of the Department's preliminary determination to the date of publication of the final injury determination.

Under the statute, "foreign market value" is computed by one of three methods: (1) home market sales; (2) third country sales; or (3) constructed value. The home market sales method is preferred but, in its absence, either of the other methods may be used. Foreign market value computed on the basis of home market sales or third country sales is subject to adjustment under Section 1677b(a)(4) in order to eliminate elements that would distort the price comparison.

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[1]Both the Commission and the Department must make affirmative determinations before antidumping duties are imposed. Thus, the determination by the Department in response to petitioner's request for an investigation in 1974 is irrelevant because the Commission at that time determined that there had been no material injury to petitioner. Contrary to the implication in the petition (Pet. 5), there was no six-year delay in signing an antidumping duty order, since the prior investigation's conclusion of no injury to petitioner was affirmed by the Court of International Trade (Pet. 5 n.5).

The United States price is computed by one of two methods: purchase price or exporter's sales price. The statute attempts to construct value on the basis of arm's length transactions. It provides, therefore, for different methods of computing the United States price depending upon the relationship of the importer to the foreign producer. If the importer is unrelated, purchase price is used. Purchase price is the actual or agreed upon price between the foreign producer and the independent importer prior to the time of importation. If, however, the importer is related to the producer, the statute requires use of the exporter's sales price, which is the price at which goods are eventually sold in an arm's length transaction, whether from the importer to an independent reseller or directly to the public.

The statute attempts to reconstruct both the United States price and the foreign market value at a common point in the chain of commerce so as to allow a fair comparison. The statute, therefore, provides for specific adjustments in order to derive a fair United States price for comparison with foreign market value. The adjustments provided in Section 1677a(d) are applicable to both purchase price and exporter's sale price. The additional adjustments provided in Section 1677a(e) are applicable only to exporter's sales price. As noted, foreign market value is also subject to adjustment.

The Department computes and, if necessary, adjusts both the United States price and the foreign market value of the merchandise. It then compares these values which, after adjustment, should be on an equivalent basis. The amount by which the foreign market value exceeds the United States price is the "dumping margin" and is then imposed as an antidumping duty.

The statutory adjustments to foreign market value include allowances for all packing "costs, charges, and expenses" to the foreign manufacturer or exporter involved in placing the merchandise in condition to ship to the United States. 19 U.S.C. 1677b(a)(1). The adjustments to United States price are for specified direct costs. 19 U.S.C. 1677a(d). If the exporter's sales price is used, additional allowances are applicable, including the amount of any sales commissions in the United States, "expenses generally incurred by or for the account of the exporter in the United States in selling" the merchandise, and any increased value resulting from post-import manufacture or assembly. 19 U.S.C. 1677a(e).

In addition to these adjustments, the statute provides that, "[i]n determining foreign market value, if it is established to the satisfaction of the [Secretary of Commerce] that the amount of any difference between the United States price and the foreign market value (or that the fact that the United States price is the same as the foreign market value) is wholly or partly due to * * * *other differences in circumstances of sale* * * * then due allowance shall be made therefor." 19 U.S.C. 1677b(a)(4)(B) (emphasis added).

In accordance with the statute's provision that "[r]egulations necessary or appropriate to carry out actions proposed in any statement of proposed administrative action * * * shall be issued" (19 U.S.C. 2504(b)), the Secretary of Commerce has issued regulations relating to differences in circumstances of sale. 19 C.F.R. 353.15.[2] The regulations

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[2]In his statement of administrative action submitted to Congress, the Secretary of the Treasury, who was then the administering authority, proposed the following action with regard to foreign market value (House Doc. 96-153 (Pt. II), 96th Cong., 1st Sess. 411 (1979)):

> By regulation, the [administering authority] will establish groups of adjustments based on those currently recognized, namely, those

provide that reasonable allowances will be made for bona fide differences in circumstances of sale "to the extent that it is established to the satisfaction of the Secretary that the amount of any price differential is wholly or partly due to such differences." 19 C.F.R. 353.15(a).

In general, differences for which allowance is made "are limited * * * to those circumstances which bear a direct relationship to the sales which are under consideration." 19 C.F.R. 353.15(a). These include "differences in credit terms, guarantees, warranties, technical assistance, servicing, and assumption by a seller of a purchaser's advertising or other selling costs." 19 C.F.R. 353.15(b). Reasonable allowances are generally "made for differences in commissions" but not for "differences in advertising and other selling costs of a seller, unless such costs are attributable to a later sale of merchandise by a purchaser." *Ibid.*

The regulations also contain a "Special Rule" which provides that, when comparisons are made using the exporter's sales price, reasonable allowance will be made for all actual selling expenses incurred in the home market up to the amount of the selling expenses incurred in the United States market." 19 C.F.R. 353.15(c). In another section, known as the "Cost Rule," the regulations provide that, "[i]n determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such differences to

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based on differences in the quantities sold, qualitative characteristics of the goods, the circumstances of their sale, and the levels of trade in the markets being compared.

The Trade Agreements Act required that regulations necessary to carry out the actions proposed in the statement be issued within one year after those agreements approved under the Act became effective. 19 U.S.C. 2504(b). The agreements went into effect on January 1, 1980, and the regulations were issued in February 1980. See 45 Fed. Reg. 8182-8208 (1980).

the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise." 19 C.F.R. 353.15(d).

2. Petitioner is a manufacturer of portable electric typewriters. In 1979, petitioner filed an antidumping petition alleging that such typewriters were being sold in the United States at less than fair market value and were injuring the domestic industry. On May 9, 1980, the Department of Commerce issued an antidumping order that announced the determination of the Department and the International Trade Commission that portable electric typewriters from Japan were being sold at less than fair value in the United States to the material injury of the domestic industry (Pet. App. 83a-85a; 45 Fed. Reg. 30618-30619 (1980)).

At the request of respondents Brother Industries, Inc. ("Brother") and Silver Seiko, Ltd. ("Silver"), the Department made an early determination of dumping duties, pursuant to 19 U.S.C. 1673e(c) (Pet. App. 86a-96a; 45 Fed. Reg. 53853-53856 (1980)). The early determination was based upon merchandise entered or withdrawn from the warehouse between January 4, 1980 and May 7, 1980. As part of the early determination, the Department made several adjustments to market value. The estimated dumping margins in this early determination were based on a different time period, and were lower, than the initial estimates in the antidumping order.[3]

In August 1980, petitioner brought an action in the United States Customs Court (now the United States Court of International Trade ("CIT")) contesting this early determination of dumping duties. Petitioner asserted that the

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[3]Antidumping margins were initially estimated at 48.7% ad valorem for Brother and 36.53% ad valorem for Silver; these were reduced to 5.31% ad valorem and 14.91% ad valorem, respectively (Pet. App. 3a n.4).

adjustments to foreign market value permitted by the Department of Commerce were contrary to law and unsupported by substantial evidence in the administrative record. Petitioner contended that the regulations providing for the exporter's sales price offset, 19 C.F.R. 353.15(c), and for reliance on cost to the seller in making reasonable allowances for differences in circumstances of sale, 19 C.F.R. 353.15(d), were inconsistent with and violated the statute. The CIT granted the government's motion for summary judgment and upheld the early determination of antidumping duties in all respects (Pet. App. 28a-72a).

The court of appeals affirmed (Pet. App. 1a-27a). The court held that the statute gives the Secretary of Commerce "broad discretion in making adjustments" and concluded that "the Secretary did not abuse that discretion by relying on the use of cost to make circumstances of sales adjustments" (*id.* at 16a). Similarly, the court upheld the exporter's sales price offset regulation as "a proper and reasonable exercise of the Secretary's authority to administer the statute fairly" (*id.* at 21a). The court also held that, "in determining the amounts of the three specific adjustments challenged by [petitioner], the [Department of Commerce] acted within the framework of the statute and regulations. The amounts of these specific adjustments are supported by substantial evidence" (*id.* at 27a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with the decisions of this Court or any other court of appeals. Congress has vested the United States Court of Appeals for the Federal Circuit and the Court of International Trade with exclusive jurisdiction of actions brought under the antidumping laws. See Pub. L. No. 97-164, § 127(a), 96 Stat. 37-38 (to be codified at 28 U.S.C. 1295(a)(6)); 28 U.S.C. (Supp. V) 1581(c). These courts applied their specialized expertise in this area in ruling that,

under settled principles of law, the regulations at issue were validly promulgated by the Secretary of Commerce in a proper and reasonable exercise of his statutory discretion. Accordingly, further review is not warranted.

1. Petitioner argues (Pet. 10-19) that 19 U.S.C. 1677b(a), as construed by the court of appeals, is unconstitutional because it unlawfully delegates legislative authority to the Secretary of Commerce. At bottom, however, petitioner's complaint appears to be that the so-called "Special Rule" (19 C.F.R. 353.15(c)), which permits adjustments in the exporter's sales price for all actual selling expenses incurred in the home market up to the amount of selling expenses incurred in the United States market, for purposes of determining antidumping duties, is not authorized by the statute. Regardless of how petitioner's argument may be characterized, we submit that the court of appeals was correct in concluding that, in issuing the Special Rule, the Secretary acted reasonably and within the constitutionally permissible authority delegated to him by Congress.

This Court has repeatedly reaffirmed the authority of Congress to "delegate powers to agencies, setting standards to guide their determination." *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 342 (1974). Accord, *Hampton & Co.* v. *United States*, 276 U.S. 394, 404-411 (1928). In this case, the Secretary clearly acted within such a constitutional delegation of powers. The antidumping law prescribes an elaborate scheme for the determination and imposition of antidumping duties. It includes general standards for assessing foreign market value and United States price, from which the dumping margin, and thus the appropriate duty, may be computed. The statute delegates to the Secretary the limited authority to issue regulations for determining when a particular difference in circumstances of sale accounts for a price differential and for determining what constitutes differences in circumstances of sale for

which a "due allowance" should be made. The Special Rule was issued in compliance with this limited statutory mandate.

In 19 U.S.C. 1677b(a)(4), Congress provided for a "due allowance" for "other differences in circumstances of sale," without specifying the circumstances. The statute provides that adjustments shall be made to foreign market value if it is established *to the satisfaction of the Secretary* that the amount of any difference between the United States price and the foreign market value of the merchandise is wholly or partly due to differences in circumstances of sale. As the court of appeals noted (Pet. App. 13a), the statute "does not expressly limit the exercise of the Secretary's authority to determine adjustments, nor does it include precise standards or guidelines to govern the exercise of that authority." The statute does not define the term "circumstances of sale" or prescribe any method for determining allowances; rather, "Congress has deferred to the Secretary's expertise in this matter" (*ibid.*).

Although, as the court of appeals observed (Pet. App. 20a), the legislative history is ambiguous on this issue, the offset provided by the Special Rule is clearly required in order to allow a fair comparison between United States price and foreign market value when the exporter's sales price is used to determine United States price. Thus, if a foreign manufacturer incurs selling expenses that have been deducted from the sales price to an unrelated customer in the United States for purposes of calculating the exporter's sales price under 19 U.S.C. 1677a(c) and (d)(2), then some adjustment must also be made to the foreign market value for the selling expenses incurred in selling in the home market in order for there to be a fair and equitable price comparison. As the court of appeals stated (Pet. App. 19a-20a):

> One of the goals of the statute is to guarantee that the administering authority makes the fair value comparison on a fair basis — comparing apples with apples. The offset appears to generate two fair value comparisons, apples with apples (purchase price) and oranges with oranges (exporter's sales price). The difference between United States price generated from purchase price and from exporter's sales price was created by the statute. Were it not for the exporter's sales price offset, comparisons based on purchase price would be fair, yet comparisons based on exporter's sales price would be skewed in favor of a higher dumping margin. We do not believe that the statute requires the Secretary to compare both apples and oranges with only apples. Rather, it expressly requires a fair comparison. The offset is an attempt to achieve such a comparison.

Furthermore, we note that the limitation of the exporter's sales price offset to the amount of selling expenses incurred in the United States keeps the adjustment to a minimum. In short, as the court of appeals concluded (Pet. App. 20a), the Special Rule offset is necessary "to achieve a broader statutory purpose otherwise frustrated because of the alternative statutory methods of computing United States price."

2. Petitioner contends (Pet. 19-25) that the "Cost Rule" (19 C.F.R. 353.15(d)), as construed by the court of appeals, is irrational and embodies an irrebuttable presumption that is inconsistent with the underlying statute, 19 U.S.C. 1677b(a)(4). This contention is without merit.

The Cost Rule provides:

> In determining the amount of the reasonable allowances for any differences in circumstances of sale, the Secretary will be guided primarily by the cost of such

> differences to the seller, but, where appropriate, he may also consider the effect of such differences upon the market value of the merchandise.

Contrary to petitioner's contention, the court of appeals did not construe the Cost Rule in a manner that creates an irrebuttable presumption. Petitioner mischaracterizes the holding of the court of appeals. The court actually stated (Pet. App. 16a-17a n.26):

> We do not hold that the Secretary may blindly rely on cost to the exclusion of its effect on value. Such would clearly violate the statute's primary reliance on value in the computation of antidumping duties, as well as its requirement of a direct relationship. We hold only that, absent evidence that costs do not reflect value, the Secretary may reasonably conclude that cost and value are directly related. [Petitioner] also argues that this would upset the burden of proof on the importer to establish entitlement to adjustments. We cannot agree. The use of cost criteria to satisfy the quantum of evidence required to establish entitlement is reasonable. Whatever the quantum of evidence that would "satisfy" the Secretary, once that evidence is adduced, the "burden" will be "shifted" in every case. [Petitioner's] remedy lies with Congress. Congress can provide more specific guidelines to govern the exercise of the Secretary's discretion; this court cannot.

Thus, rather than creating an irrebuttable presumption, the court simply held that it was within the Secretary's discretion to use cost criteria in determining allowances based on differences in circumstances of sale.[4]

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[4]Petitioner's reliance (Pet. 20-21) on *ICC* v. *J-T Transport Co.*, 368 U.S. 81 (1961), is misplaced. That case simply held that the provision of the Interstate Commerce Act at issue did not authorize the ICC to create a presumption that would have placed upon contract carrier

Moreover, in the antidumping law, Congress itself assumed a correlation between cost and price. The court of appeals noted that the language of the statute "specifies that adjustments are to be made on the basis of differences in *price* or *value*" (Pet. App. 13a) (emphasis in original). This is consistent with the statutory use of value for determining antidumping duties. Yet, as the court of appeals also observed, the statute "does not explicitly forbid reliance on cost" and even "encourages the use of cost to fix foreign market value in some limited circumstances" (*ibid.*) (footnote omitted). In examining the legislative history, the court observed that there were "general theoretical conflicts in legislative purpose" (*id.* at 14a). On the one hand, Congress recognized the unreliability of cost as a basis for computing dumping margins; on the other hand, however, cost data are likely to be the only practical and reliable information available for making circumstances of sale adjustments, especially within the rigid time limits the law imposes on the Secretary (*id.* at 16a-17a). The Cost Rule is consistent with this approach because, as the court of appeals concluded, the rule "does not *prohibit* reliance on value, but merely expresses a preference for cost" (*id.* at 17a) (emphasis in original).[5] In sum, petitioner has failed to

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applicants a burden that Congress had specifically rejected when confronted with a proposed amendment to that effect. The decision has no application to this case, because, as we show below in the text, the Cost Rule promulgated by the Secretary accords with the statutory purpose of the antidumping law.

[5]The CIT explained at greater length the need for reliance on cost in making the circumstances of sale adjustment (Pet. App. 44a-45a) (emphasis in original):

> [F]or all practical purposes, the cost approach in most instances is the only efficient means of administering the circumstances of sale adjustment, considering that foreign market value and United States price must under the antidumping law be determined within very strict limits of time * * *.

demonstrate that the court of appeals erred in concluding that the Secretary acted reasonably and within his statutory discretion in promulgating the Cost Rule.

In direct contrast to the primary cost approach provided in 19 C.F.R. § 353.15(d), the alternative market value methodology prescribed by the regulation is much more difficult, and in many instances impossible, to administer fairly and efficiently. To require Commerce to analyze the effects on market value of every difference in circumstances of sale would be to require a highly complex quantification process involving a multitude of economic factors, *including a cost analysis*, and to do so within strict time limits. I have no doubt that if the market value approach were the sole (or even the primary) method utilized for quantifying adjustments for differences in circumstances of sale, as a practical matter the resulting adjustments in many instances would be purely speculative or sheer guesswork.

The present regulation, in any case, does contemplate the possibility of situations where a specific difference in circumstances of sale may bear no perceived market value (or a market value more or less than cost) in either the United States market or in the home market, since the regulation expressly provides that "where appropriate [the administering authority] may also consider the effect of such differences upon the market value of the merchandise." Consequently, the regulation, while it gives primary emphasis to cost differentials, does not preclude a market value analysis in appropriate instances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

ROBERT E. KOPP
CHRISTINE R. WHITTAKER
Attorneys

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